

EXHIBIT 4

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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE**

**IN RE: SOUTHEASTERN MILK
ANTITRUST LITIGATION**

THIS DOCUMENT RELATES TO:

FOOD LION, LLC, and

FIDEL BRETO, d/b/a FAMILY FOODS,

**on behalf of themselves and a class of all
others similarly situated,**

Plaintiffs,

v.

**DEAN FOODS COMPANY,
DAIRY FARMERS OF AMERICA, INC.,
NATIONAL DAIRY HOLDINGS, L.P.,
DAIRY MARKETING SERVICES, LLC,
and
SOUTHERN MARKETING AGENCY,
INC.**

Defendants.

MDL No. 1899

Master File No. 2:08-MD-01000

Case No. 2:07-CV-188

Judge J. Ronnie Greer

Magistrate Judge Dennis H. Inman


EXPERT REPORT OF H. STEPHEN GRACE, JR., PH.D.

MARCH 4, 2010

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Expert Report of H. Stephen Grace, Jr., Ph.D.

March 4, 2010

CHAPTER ONE: INTRODUCTION AND HSG&CO. PERSONNEL

A. Introduction

1. I am the President and Chief Executive Officer of H.S. Grace & Company, Inc. ("HSG&Co.") and Grace & Co. Consultancy, Inc. HSG&Co. provides specialized financial and operational advisory services, assists on complex commercial litigation, and advises on issues of corporate governance, oversight and control. My Curriculum Vitae is attached including a list of addresses and publications on Exhibit I. The Board of Advisors of Grace & Co. Consultancy is shown on Exhibit II.

2. I am being compensated at the rate of \$650 per hour. Other individuals assisting me have billing rates from \$110 per hour to \$625 per hour. Our compensation is not dependent on the outcome of this matter. A list of cases in which I have testified as an expert at trial or by deposition is attached as Exhibit III.

3. My Index of documents is attached as Exhibit IV. My work on this matter is ongoing. I reserve the right to amend or update this report as new materials come to my attention.

B. HSG&Co. Experience

4. I and the members of the HSG&Co. team are experienced and familiar with the planning, development, financing, and operation of a broad range of business structures. These include corporations, limited and general partnerships, joint ventures, and limited liability companies, which involve public and private companies, parent-subsidary relationships and other business structures.

5. I and the members of the HSG&Co. team are experienced and familiar with a broad range of management and board practices and processes applicable to a range of organizations as described above. The HSG&Co. team understands the business responsibilities of senior management, boards, and others and the importance of ensuring that these responsibilities are properly addressed.

6. I and the members of the HSG&Co. team are experienced and familiar with business investments and business investment decision-making processes which may involve mergers and acquisitions; the start-up, shut-down, expansion, and contraction of business units and operations; systems development and implementation; and the hiring and termination of senior executives, and we understand that business investment decisions involve risk. I and the members of the HSG&Co. team are familiar with the structure, operation, and financing of various types of supply agreements, and understand that supply agreements must be evaluated based on the specifics of each situation, the parties involved, and other factors.

7. I and the members of the HSG&Co. team are experienced and familiar with the promoting, hiring, termination, and compensation of senior executives. I and the HSG&Co. team members are experienced and familiar with the negotiation of employment agreements and amendments to employment agreements, the awarding of special compensation and bonuses, and the need for guidelines and restrictions regarding executive activities to avoid conflicts of interest and actions on the part of executives detrimental to the well-being of the executive's employer.

8. I and the HSG&Co. team are experienced and familiar with various forms of appropriate and inappropriate business collaboration and the importance of the proper oversight

and control mechanisms at various levels within an organization in order to attempt to prevent inappropriate collaboration.

9. HSG&Co. has provided consulting and/or expert witness services in over 75 cases. Almost all of these cases have involved an examination of the responsibilities of the primary and related parties, and whether these parties did or did not satisfactorily address their responsibilities in those circumstances. HSG&Co.'s involvement in the Walt Disney Shareholder Derivative Litigation in Delaware regarding the hiring and the termination of Michael Ovitz is an example (Consolidated C.A. No. 15452). In the spring of 2003, the primary D&O carrier and its counsel requested that HSG&Co. examine certain aspects of the Walt Disney litigation. There was recognition among the parties of the potential value of developing a fact-based business analysis of the hiring and the subsequent termination of Michael Ovitz. HSG&Co.'s analysis focused on the responsibilities of senior management and the Disney Board, the management and governance practices used in addressing these responsibilities, and a comparison of those practices with the allegations set out in the Plaintiffs' Second Amended Consolidated Derivative Complaint.

10. HSG&Co. assembled a team experienced in the examination of business practices and corporate actions. HSG&Co., in May of 2003, reported its findings that the Plaintiffs' allegations were not supported by the business facts. These findings were further supported and set out in writing in June, 2004 in a report to HSG&Co.'s clients. The trial began in October 2004, and the Chancery Court Opinion was issued in August, 2005, finding 100% in favor of the Defendants. The Delaware Supreme Court affirmed the Chancery Court ruling in 2006.

11. HSG&Co. has recently authored two articles regarding its work on the Disney matter. The most recent article appeared in the July/August issue of the New York State Bar

Association *Journal*, "Plaintiff Expert Reports: An Insider Revisits Disney." The initial article was published in the August, 2008 issue of *Directors Monthly*, "An Insider Revisits the 'Disney Case.'" *Directors Monthly*, the publication of the National Association of Corporate Directors, lists the names of the other HSG&CO. team members. The articles are attached as Exhibit V and Exhibit VI.

12. I have authored over forty articles, the majority in peer-reviewed professional journals which address management and board practices, issues regarding corporate governance, oversight and control, and related topics. Additionally, I have spoken numerous times on these topics. These articles and addresses are included in my attached Curriculum Vitae (Exhibit I).

13. I hold a Ph.D. in Economics, and my area of focus has been microeconomics, which incorporates the structure, finance and operation of individual firms. I taught corporate (business) finance courses at the undergraduate and graduate level and have been published in peer-reviewed academic journals. These articles are included in my Curriculum Vitae.

14. My work as CFO of both Century Corporation and Century Development Corporation encompassed a broad range of financing, due diligence and organizational responsibilities including the oversight and control of the financing requirements and cash flows of the parent, its subsidiaries, and a number of the general partnerships, limited partnerships and joint ventures in which the parent or its subsidiaries participated. The cash flows and financing requirements were monitored individually and in the aggregate. Financing responsibilities also included the financing of both new acquisitions and new investments by existing business units. Due diligence responsibilities included the acquisition of an existing auto and equipment leasing firm, the acquisition of a national sports franchise (team), the undertaking of new joint ventures, the startup and operation of a private tennis/athletic/dining club, the evolution of multiple new

real estate investments, and the startup of a cable TV operator. Involved in these activities were organizational decisions regarding business objectives, personnel, compensation and the structure of appropriate oversight and control systems.

15. As the financial advisor and real estate consultant to the Unsecured Creditors Committee in the L.J. Hooker bankruptcy, which owned significant retail operations and real estate holdings, I was involved in a broad range of financial, due diligence and organizational decisions including working with approved buyers of the L.J. Hooker assets to insure their due diligence was proper and timely – thus permitting the closing of the sale of the Hooker assets. While I was President and CEO of Dane Development Corporation, Dane served as project manager on projects where the primary lender failed during the course of the project, and Dane directed the project to completion. As CEO of Dane, I had the senior most decision-making authority. Lastly, my academic experience familiarized me with additional financing, due diligence, organizational and related issues.

16. HSG&Co. has staffed this engagement with Advisors from its team of senior executives. Advisors were chosen based on their experience analyzing conformity with usual and customary business principles and practices, or deviations from the same.

CHAPTER TWO: SCOPE OF THE ASSIGNMENT

17. HSG&Co. has been retained by counsel for the Retailer Plaintiffs to analyze fluid milk industry transactions and activities, particularly in Order 5 and Order 7 (“Southeast”), and to assess whether or not they are consistent with a competitive marketplace with respect to the production, bottling, and sale of Class I Grade A fluid milk. As part of the analysis, HSG&Co. has undertaken an extensive review of the relationships of the entities and transactions between

the entities which are defendants in the captioned action ("Defendants") and individuals through which they acted.

18. The HSG&Co. examination has focused on the relationships among the Defendants and individuals through whom the Defendants acted, and the arrangements put in place and the actions taken in the course of these relationships. The examination has addressed (1) whether the arrangements put in place and the actions taken by the Defendants, if taken independently, would be consistent with, or contrary to, their respective economic interests in a competitive marketplace, (2) whether the Defendants had the opportunity to exchange, or did exchange, information relative to the arrangements put in place and the actions taken, and (3) whether Defendants had common motives for the arrangements put in place and the actions taken.

19. The time period being examined is from the 1990s to the present. The entities being examined include Dean Foods Company ("Dean"), National Dairy Holdings, L.P. ("NDH"), Dairy Farmers of America, Inc. ("DFA"), Dairy Marketing Services, LLC ("DMS"), Southern Marketing Agency, Inc. ("SMA"), and Suiza Foods Corp. ("Suiza"), as well as their parents, subsidiaries, predecessors, successors, and various joint ventures. The current and former executives who acted on behalf of these entities include Alan Bernon ("Bernon"), Cletes "Tex" Beshears ("Beshears"), Gerald "Jerry" Bos ("Bos"), Martin Devine ("Devine"), Gregg Engles ("Engles"), Gary Hanman ("Hanman"), Allen Meyer ("Meyer"), Tracy Noll ("Noll"), Pete Schenkel ("Schenkel"), Rick Smith ("Smith"), John Wilson ("Wilson"), and Ernest Yates ("Yates").

20. Other entities examined include the predecessor Dean Foods Company ("Legacy Dean"), which was acquired in late 2001 by Suiza with the Dean name being retained, and Suiza

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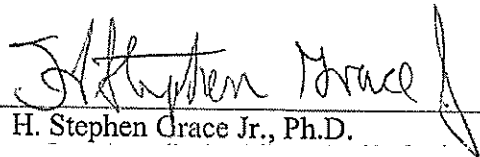
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H. Stephen Grace Jr., Ph.D.

March 4, 2010
Date

H. Stephen Grace, Jr., Ph.D.**Background, Addresses, and Publications**

Dr. Grace is the President of H.S. Grace & Company, Inc. The firm's services represent a combination of business and academic experience, draw on Dr. Grace's more than 35 years of Senior Management, Faculty, and Consultant experience, and incorporate work reflected in his broad range of publications.

- * **Education:** B.S. - Industrial Engineering, Lamar University (1964); M.B.A. - University of Chicago (1966); Ph.D. - Economics, University of Houston (1970).

H.S. Grace & Company, Inc.: Incorporated in 1985. Dr. Grace is President and CEO. The firm was reactivated in May 1993 after Dr. Grace left Deloitte & Touche. The company provides specialized financial and operational advisory services to healthy and troubled companies, assists in complex commercial litigation, and advises on issues of corporate governance, oversight and control.

Touche Ross & Co./Deloitte & Touche (1988-1993): Served as National Director at Large with responsibilities in the areas of real estate, finance and litigation consulting for the New York region and nationally serving a variety of high profile clients.

Dane Development Corporation: (1981-1988): Served as President & Chief Executive Officer of Dane Development and related companies owned equally by Dr. Grace and Richard A. Meyers. Mr. Meyers died in May 1985 and his stock was acquired by Dr. Grace. Dane and its sister firms performed finance, project management, and related work for developers, lenders and for the account of Mr. Meyers and Dr. Grace in connection with over \$100 million of projects.

Century Corporation/Century Development Corporation (1976-1981): Served as Vice President of Finance & Chief Financial Officer of Century Corporation, parent holding company, with direct responsibility for the financial activities and oversight of over sixty subsidiaries, joint ventures, and affiliated companies with activities including auto and equipment leasing, cable TV, architectural services, and sports franchises (NBA, hockey, soccer).

Simultaneously served as Senior Vice President & Chief Financial Officer of Century Development Corporation with direct responsibility for day-to-day financial and operational activities of over 10 million square feet of commercial space in addition to retail space, hotels, high-rise condominiums, city clubs and a major arena.

Other Activities: Consultant - Communicators Federal Credit Union (1973-1993); Consultant - Marathon Manufacturing Company (NYSE) (1974-75, and 1987-88); Consultant/Assistant Treasurer - Zapata Corporation (NYSE) (1973-74); Consultant - Hydrotech Corporation (1975-76); Assistant/Associate Prof. Of Finance - Texas Southern University (1970-76); Financial Assistant to the President - Ennis Business Forms (NYSE) (1969-70), Instructor of Economics and Statistics - University of Houston (1966-69); McKinsey & Co. (1965-66).

Professional Affiliations: Financial Executives International - National Chairman 2003-2004, Member of The Office of the Chairman, formerly President of the New York City Chapter and of the Houston Chapter, Area Director, Area Vice President, and Trustee of The Financial Executives Research Foundation. Member since 1970.

Forbes CFO Forum Advisory Board - Member since 1997.

The CPA Journal - Editorial Board

New York State Society of CPAs (NYSSCPA) - Quality Enhancement Policy Committee

Lamar University College of Engineering - Advisory Council - Founding Member
Lamar University College of Business - Advisory Council

Jesse H. Jones School of Business, Texas Southern University - Advisory Council

Calvert House, University of Chicago – Advisory Council

Accredited Instructor for Continuing Legal Education (CLE) - States of Michigan, New York, Pennsylvania and Texas

Accredited Instructor for Continuing Education (CE) for Property and Liability Insurance License Holders - States of North Carolina and Texas

Addresses:

“Corporate Governance – Managing Litigation Risks” – Panel Member, Financial Executives International – Houston Chapter, The Houston Country Club, Houston, Texas, February 16, 2010.

“Ethics and the Evolution of Corporate Governance – with Comments on Related Economic Issues,” Keynote speaker, John Wesley Methodist Church Men’s Breakfast, Victoria, TX, June 10, 2009.

“The Current ‘Ethics’ Evolution,” Keynote Speaker, Rotary Club of Beaumont, Beaumont, TX, March 4, 2009.

“Corporate Governance – A Director’s Guide to Managing Risks and Related Litigation,” Panel Member, National Association of Corporate Directors, The Houstonian Hotel, Houston, TX, January 8, 2009.

“Bailouts, Banking and Busts = Fraud, Forensics and Opportunity?” Panel Member, Financial Executives International – New York Chapter, The Union League Club, New York, NY, November 18, 2008.

“Litigation and the Financial Executive,” Panel Member, Financial Executives International – Dallas Chapter, Bent Tree Country Club, Dallas, TX, November 12, 2008.

“Corporate Counsel,” Panel Member, SMU Dedman School of Law – 16th Annual Corporate Counsel Symposium, Omni Mandalay Hotel at Las Colinas, Dallas, TX, October 3, 2008.

“Managing Corporate Litigation Risks,” Moderator and Panel Member, Co-Sponsored by H.S. Grace & Company, Inc. and AIG Program, The Houstonian Hotel, Houston, TX, April 9, 2008.

“Corporate Governance, Litigation Risk, and the Delaware Courts,” Panel Member, SMU Dedman School of Law – Corporate Directors’ Institute Program, Omni Mandalay Hotel at Las Colinas, Dallas, TX, February 28, 2008.

“NACD Top Ten Issues for Your Board to Consider in 2008 - Director Series Program,” Panel Member, National Association of Corporate Directors, The Houstonian Hotel, Houston, TX, February 14, 2008.

“Ethics, the Evolution of Corporate Governance, and the Challenges of Measurement,” Keynote Speaker, River Oaks Breakfast Club, Houston, TX, June 28, 2007.

“Ethics, the Evolution of Corporate Governance, and the Challenges of Measurement,” Keynote Speaker, Financial Executives International – New York Chapter, Union League Club, New York, NY, May 23, 2007.

"Ethics, the Evolution of Corporate Governance, and the Challenges of Measurement," Keynote Speaker, ExxonMobil Executive in Residence Program, Lamar University, Beaumont, TX, April 10, 2007.

"Ethics, Corporate Governance, and Related Economic Issues," Keynote Speaker, Board of Directors meeting, The New York State Society of Certified Public Accountants, Helmsley Hotel, New York, NY, April 4, 2007.

"Fiduciary Duties: Who Owes What to Whom – and When," Panel Member, TMA Workshop – Topics in Restructuring: from the Bench, the Bar and noted experts, Belo Mansion, Dallas, TX, September 21, 2006.

"Corporate Fiduciary Duties in the Magic Kingdom and Elsewhere." Speaker, Fulbright & Jaworski L.L.P., The Houstonian Hotel, Houston, TX, December 7, 2005.

Effective Governance in Ethic-less Organizations. SmartPros. Financial Management Network. DVD. September 2005.

"Building Ethical Behavior Into An Organization." Speaker at the Ethics Week Forum "Maintaining Ethics in Profit Driven Enterprises," Baruch College CUNY - Robert Zicklin Center For Corporate Integrity, April 13, 2005.

"Ethics And The Evolution Of Corporate Governance: An External And Internal Opportunity And Challenge ..." Keynote Speaker, Zurich Insurance Management Solutions Group, The Portifino Bay Hotel, Orlando, Florida, February 16, 2005.

"The SEC's coming, what do you do?" Forbes CFO Forum, February 1-2, 2005, New York, NY, Plaza Hotel, Panel Member - Audience taken through anatomy of a corporate investigation.

"Ethics, The Evolution of Corporate Governance and the Challenges of Measurement." Keynote Speaker, C.T. Bauer College of Business - "Bridging the GAAP" Seminar, *Stanford Financial Speaker Series*, University of Houston, April 30, 2004.

"Ethics and the Evolution of Corporate Governance." Keynote Speaker, Jesse H. Jones School of Business – Annual Awards Banquet, Texas Southern University, April 23, 2004.

"Current Developments in Corporate Governance." Speaker, Institute of Management Accountants, Long Island, NY Chapter, April 20, 2004.

"Ethics and the Evolution of Corporate Governance." Keynote Speaker, Financial Executives International – Houston Chapter, The Houston Country Club, Houston, Texas, February 17, 2004.

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"Audit Committee Composition and Responsibilities." Panelist, New York CityBar: Sarbanes/Oxley Act Financial and Accounting Implementation Strategies – A Look Back – A Look Ahead, CityBar Center for CLE, New York, New York, June 2, 2003.

"From Tone at the Top to Checks and Balances." Speaker, The Institute of Internal Auditors' 2003 General Audit Management Conference: A Golden Opportunity for Chief Audit Executives, Disney's *Yacht and Beach Club* resorts, Orlando, Florida, March 10, 2003.

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"Corporate Governance and Corporate Management." Panelist, Foundation for Accounting Education (FAE): The Future of SEC Practice After Enron, New York Helmsley Hotel, New York, New York, August 19, 2002.

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"The Mock Deposition of an Audit Committee Chair." Moderated mock deposition and spoke regarding the evolving responsibilities of audit committees. Presented to the Financial Executives International – Pittsburgh Chapter, May 1, 2001; the Financial Executives International – Detroit Chapter, April 30, 2001; the Financial Executives International – Dallas Chapter, January 9, 2001; Forbes CFO Forum, May 17, 2000; the Financial Executives Institute- New York City Chapter, February 1, 2000; and the Financial Executives Institute- Houston Chapter, January 25, 2000.

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"Cash Forecasting & Control: Beyond the Fundamentals." Address to Forbes Special CFO Forum, Charleston, May 1999.

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H.S. Grace & Company, Inc.

EXHIBIT II

H. Stephen Grace, Jr., Ph.D., President
Steve Grace, Director of Operations

H.S. Grace & Company, Inc. specializes in helping clients solve complex business challenges. Our team of senior executives offers unparalleled depth and breadth of experience to comprehensively analyze issues and identify optimal resolutions.

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We can help diagnose and resolve the complex issues companies face to enhance shareholder value, protect reputation and long-term ability to succeed, manage litigation, and successfully navigate major changes such as mergers and acquisitions or bankruptcies. H.S. Grace & Company, Inc. brings unparalleled experience, a comprehensive approach and valuable insights to the table.

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*Board of Directors, and Executive Vice President and CFO (Ret.),
Western & Southern Life Insurance Company;
Former Chairman, Financial Executives International*

George Cox

Managing General Partner (Ret.), Park Central Ltd.

Jeffrey E. Curtiss

*Director and Audit Committee Chairman of KBR, Inc.; Former
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Former Secretary, Financial Executives International*

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*Board of Directors, Pioneer Natural Resources;
Treasurer (Ret.), Mobil Corporation;
Former Chairman, Financial Executives International*

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Director, Gensler Worldwide

John E. Hauptert

Treasurer (Ret.), The Port Authority of New York and New Jersey

Peter Howell

Direktor, Credit Risk Management (Ret.), Deutsche Bank A.G.

Steven B. Lilien

*Weinstein Professor of Accounting and
Former Chairman of the Stan Ross Department of Accounting
at Zicklin School of Business, Baruch College;
Director of Center for Financial Integrity, Baruch College*

Nicholas J. Lomonte

Vice President Finance (Ret.), ABB Lummus Global Inc.

Martin G. Mand

*Executive Vice President & CFO (Ret.), Nortel Networks;
Vice President & Treasurer (Ret.), DuPont Company;
Former Chairman, Financial Executives Research Foundation, Inc.*

Khalid S. Masood

Finance Director (Ret.), Hub Power Co., Karachi, Pakistan

S. Lawrence Prendergast

*Executive Vice President of Finance & Director (Ret.),
LaBranche & Co. Inc.; Chairman & CEO (Ret.) and Director,
AT&T Investment Management Corp.;
Former Chairman, Financial Executives Research Foundation, Inc.*

Francis C. Regnier

Former CEO, Montaigne Diffusion (LACOSTE), Paris, France

Robert S. Roath

*Board of Directors and Audit Committee Chair, InterDigital
Communications Corporation; Chairman of Advisory Board, L.E.K.
Consulting; Former CFO, RJR Nabisco*

The Honorable William M. Schultz

Former United States Bankruptcy Judge, Southern District of Texas

Ronald H. Wilcomes

Vice President and Investment Counsel (Ret.), MetLife Insurance Co.

Alfred L. Williams

*Former CFO of Tenneco Gas, Arcadian Corp.,
Moorman Manufacturing, Global Industrial Technologies, Inc.; Director
of Audit Worldwide for Tenneco, Inc.*

Walter C. Wilson

*Former Senior Vice President and CFO, EOG Resources, Inc.;
Trustee, Financial Executives Research Foundation, Inc.*

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H.S. Grace & Company, Inc.

*H. Stephen Grace, Jr., Ph.D.
Deposition/Arbitration/Trial Testimony*

- In re: Southeastern Milk Antitrust Litigation
Case No. 2:08-MD-1000
Greeneville, Tennessee
DEPOSED
- In re: Electronic Data Systems Class Action Litigation
Case No. 366-01078-2008
Dallas, Texas
DEPOSED
- David Calvert-Jones, Plaintiff vs. Helinet Aviation Services, LLC, Alan Purwin,
et al. Defendants
Case No. BC 368522
Los Angeles, California
DEPOSED
- Barry Van Roden, Plaintiff vs. Henri A. Termeer, et al.
Cause No. 03-CV-4014 (LLS)
New York, New York
DEPOSED
- Securities and Exchange Commission vs. Martin E. Kenney, Jr.
Cause No. 05CV7944 (SAS)
New York, New York
DEPOSED
- Adams Golf, Inc. Securities Litigation
Civil Action No. 99-371-KAJ
Wilmington, Delaware
DEPOSED
- Larry F. Robb vs. Stericycle, Inc., et al.
Number: 467704-A
Shreveport, Louisiana
DEPOSED
- U.S. Bank National Association, Plaintiff vs. John R. Stanley, et al., Defendants
Cause No. 2003-54145
Houston, Texas
DEPOSED

- Wells Fargo Bank N.A., Claimant vs. G.W. Manufacturing Company Inc.,
Respondent
Arbitration
Case No. 72 148 00507 03
Los Angeles, California
TESTIFIED
- Crystal Power Company, Plaintiff vs. Coastal Salvadoran Power, Ltd., Coastal
Nejapa, Ltd., El Paso CGP Company, and El Paso Corporation, Defendants
Cause No. 21815*BH02
Brazoria County, Texas
DEPOSED
- E*TRADE Securities LLC, Plaintiff vs. Deutsche Bank AG, et al. Defendants
Civil No. 02-3711 (RHK/AJB)
Minneapolis, Minnesota
DEPOSED
- SPJST et al. vs. JPMorgan Chase Bank
Cause No. 2003-24238
Houston, Texas
DEPOSED
- The Cambridge Food Group, Inc., vs. Nutmeg Insurance Company
AAA Case No. 13 Y 195 00606 04
Arbitration
New York, New York
TESTIFIED
- Costa Brava Partners III, L.P., et al., vs. JPMorgan Chase Bank
Index No. 603218/03
New York, New York
DEPOSED
- Fiber Systems International, Inc., et al. vs. Michael Roehrs
Case No. 4:04CV355
Sherman, Texas
DEPOSED
- Ernest E. Bartimmo, M.D. vs. Richard J. Pohil, M.D.
Case No. 2000-62947
Houston, Texas
DEPOSED

- Goodrich Petroleum Corporation, Goodrich Petroleum Company, L.L.C., and Goodrich Petroleum Company-Lafitte, L.L.C. vs. Stone Energy Corporation
Case No. 2000-06437
Houston, Texas
DEPOSED
- David T. Allen vs. Sidney J. Taylor, et al.
Civil Action No. 99-146-RRM
District of Delaware
DEPOSED
- Dallas Hockey Club, Inc. vs. Comerica Bank–Texas, N.A. and Joseph Lynch
Case No. DV 9806889
Dallas, Texas
DEPOSED
- Cornelius Ryan and Carl Ryan, et al. vs. Joseph Ryan and Yolanda Ryan, et al.
Case No. 70 Y 168 00179 00
Arbitration
Houston, Texas
TESTIFIED
- ALG, Inc. et al. vs. NationsBank, N.A. Midwest
Case No. 97C15260
Johnson County, Kansas
TESTIFIED
- Andover Togs, Inc. et al. vs. Mid City Associates
Bankruptcy Court
New York, New York
TESTIFIED
- Donna Kline vs. Susan Camille Lee
Houston, Texas
TESTIFIED
- Wellington Funding vs. Continental Grain
New York, New York
DEPOSED
- Susan Camille Lee et al., Plaintiff vs. Ronald C. Lee, Jr., Defendant
Case No. 137,506
Houston, Texas
TESTIFIED

Materials Considered in Forming Final Opinions

Case-Related Filings	
1.	Amended Class Action Complaint (2008.03.28)
2.	Independent Dairy Farmers and Independent Cooperative Members Complaint (2007.07.05)
3.	Baisleys, Cornett, Holmes, McCain Dairy, Rocky Creek Dairy, Vanderhyde Dairy Complaint (2007.07.05)
4.	In RE: Southeastern Milk Antitrust Litigation - Transcript of Proceedings Before the Honorable J. Ronnie Greer United States District Judge (2009.01.06)
5.	Memorandum in Support of Dairy Farmer Plaintiffs' Motion for Class Certification (2009.05.01)
6.	Retailer Plaintiffs' Memorandum in Support of Their Motion For Class Certification (2009.05.01)
7.	Defendants' Memorandum in Opposition to the Dairy Farmer Plaintiffs' Motion for Class Certification (2009.06.30)
8.	Defendants' Memorandum in Opposition to the Retailer Plaintiffs' Motion for Class Certification (2009.06.30)
9.	Retailer Plaintiffs' Reply Memorandum in Further Support of their Motion for Class Certification (2009.08.14)
10.	Independent Farms Corrected Consolidated Amended Complaint (2008.08.04)
11.	Reply Memorandum In Support Of Dairy Farmer Plaintiffs' Motion For Class Certification (2009.08.14)
12.	Concise Statement Of Undisputed Material Facts In Support Of Defendants' Motion For Summary Judgment (2009.09.18)
13.	Memorandum Of Law In Support Of Defendants' Motion For Summary Judgment (2009.09.18)
14.	Retailer Plaintiffs' Supplement to Retailer Plaintiffs' Statement of Material Facts (2009.12.23)
15.	Retailer Plaintiffs' Response to Defendants' Concise Statement of Material Facts (Response Docket 463) (2009.11.05)
16.	Retailer Plaintiffs' Memorandum of Law in Response to Defendants' Motion for Summary Judgment (Response to Docket 461) (2009.11.05)
17.	Retailer Plaintiffs' Statement of Material Facts (2009.11.05)
18.	Response to Defendants' Summary Judgment Motion Presentation (2009.12.18)

19. Retailer Plaintiffs' Replacement Memorandum of Law in Response to Defendants' Motion for Summary Judgment (Response to MDL Doc. No. 461) (2010.01.22)
20. DFA's Response to Farmer Plaintiffs' Second Set of Interrogatories (2009.12.03)

Declarations and Reports
1. Expert Declaration of Professor Einer Elhauge (2009.04.30)
2. Declaration of Ronald W. Cotterill, Ph.D. (2009.04.30)
3. Report of John C. Beyer, Ph.D. Regarding Class Certification Filed Under Seal Pursuant to Protective Order (2009.04.30)
4. Expert Report of Catherine J. Morrison Paul, Ph.D. in Support of Defendants' Memorandum in Opposition to the Retailer Plaintiffs' Motion for Class Certification (2009.06.29)
5. Expert Report of Catherine J. Morrison Paul, Ph.D. in Support of Defendants' Memorandum in Opposition to the Producer Plaintiffs' Motion for Class Certification (2009.06.29)
6. Reply Declaration of Ronald W. Cotterill, Ph.D. (2009.08.13)
7. Expert Declaration of Professor Einer Elhauge in Support of Opposition to Summary Judgment (2009.11.04)
8. Declaration of Professor Luke Froeb (2009.11.05)
9. Declaration of Ronald W. Cotterill, Ph.D. (2009.11.04)
10. Declaration of Rob Cottet (2009.07.14)

Deposition Transcripts & Testimony
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2. 2001.07.27 T. Noll
3. 2001.08.07 R. Fehr
4. 2001.08.16 G. Engles
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6. 2001.09.06 G. Bos
7. 2002.07.16 G. Hanman
8. 2003.01.24 T. Noll
9. 2003.05.13 J. Bryant
10. 2003.12.12 G. Hanman
11. 2004.01.23 A. Meyer
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15. 2005.06.30 A. Meyer
16. 2005.06.30 P. Schenkel
17. 2005.07.01 P. Schenkel
18. 2006.07.19 S. Mayfield
19. 2007.10.03 K. Turner
20. 2009.04.13 R. Allen
21. 2009.04.17 J. Bryant
22. 2009.04.21 C. Beshears
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46. 2009.10.29 R. Smith
47. 2009.10.30 E. Yates
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58. 2009.12.05 C. Covington
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62. 2010.01.06 M. Devine
63. 2010.01.12 K. Turner (NDH 30b6)
64. 2010.01.13 K. Turner (NDH 30b6)

65. 2010.01.13 R. Fehr (Dean 30b6)
 66. 2010.01.14 R. Fehr (Dean 30b6)
 67. 2010.01.26 D. Meyer (DFA 30b6)
 68. 2010.01.28 J. Clark (DFA 30b6)
 69. 2010.02.24 G. Bos
 70. 2010.02.24 G. Hanman

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DIRECTORS MONTHLY

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An Insider Revisits the "Disney Case"

By H. Stephen Grace, Jr., Ph.D.

**According to the author, who was there in the thick of it,
the Disney court got it right. Get over it.**

The smoke has cleared and the dust has settled. The corporate governance "case of the century," the shareholder derivative litigation in connection with Walt Disney Company's hiring and subsequent termination of Michael Ovitz has concluded. Both the Chancery Court and Delaware's Supreme Court found in favor of the defendant directors.

The conclusion of the "Disney case" has one exception—the continuing criticism of the Delaware courts' decisions. Immediately following the Chancery Court verdict and to the present day, these criticisms have continued. Critics charge that the courts failed to see important, highly visible facts, and that the "pro-business" inclinations of the Delaware courts drove their decisions, despite all the evidence to the contrary.

The Delaware courts have been unfairly maligned, and the inaccuracies of the criticisms should be addressed. The work of the Delaware courts as exemplified in these cases sends an important two-fold message: (1) plaintiffs' allegations must be supported by the facts; and (2) directors and officers must properly discharge

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their responsibilities.

My familiarity with the Disney case—having served as a consultant to the primary D&O carrier and its counsel— aids my understanding of the courts' opinions. The ongoing criticisms basically represent a continued acceptance of the plaintiffs' charges (led by Milberg Weiss, LLP), with the critics failing to recognize the serious flaws in these allegations, which became clear during the trial.

The Milberg Weiss Complaint

The plaintiffs' allegations were incendiary. The Plaintiffs' Second Amended Consolidated Derivative Complaint allegations included these charges:

- Paragraph 3 – Eisner recruited Ovitz as a result of their personal friendship.
- Paragraph 3 – The hiring of Ovitz was facilitated by Irwin Russell in his role as chair of the compensation committee.
- Paragraph 4 – The compensation committee “inadequately investigated the proposed terms of the Ovitz Employment Agreement (OEA)...” The compensation committee and the old board paid insufficient attention to the terms of the OEA.
- At the September 1995 meeting, more time was spent on Russell's additional compensation for handling the negotiations than on the terms of the OEA.
- Paragraph 5 – The compensation committee and the old board “indifferently and recklessly, failed to obtain and consider all material information reasonably available to them and evaluate whether the OEA was desirable from a corporate standpoint...”

The allegations continued throughout the complaint, all highly critical of the actions of Eisner and the Disney board.

The Continuing Criticisms

The criticisms that followed the courts' opinions parallel the Milberg Weiss allegations. Examples of these criticisms are provided in an article written by Professor Lucian Bebchuk, director of the Program on Corporate Governance at Harvard Law School, and in a recent book by Professor Zabihollah Rezaee. The Bebchuk article appeared immediately after the Chancery Court decision in August 2005 (“The Disney Verdict and the Protection of Investors,” *Financial Times*, August 12, 2005) and opens as follows:

The Delaware Chancery Court issued its long-awaited and important opinion in the Disney litigation earlier this week, absolving the defendant directors of any liability. The decision makes it clear that investors can-

Critics charge that the courts failed to see important, highly visible facts, and that the “pro-business” inclinations of the Delaware courts drove their decisions, despite all the evidence to the contrary.

not look to judicially imposed liability for protection from disastrous compensation decisions and other governance failures. What the decision leaves unclear, however, is where shareholders can look to for such protection under existing corporate arrangements.

Chancellor William Chandler's opinion vividly describes the governance failures at Disney: an imperial chief executive with “many lapses” and a board too willing to follow his whims; a critical report by a compensation consultant that is not circulated to all members of the compensation committee; directors that spend 25 minutes reviewing a compensation package whose problematic structure is now famous; and so forth.

Professor Bebchuk concludes his article:

By making it clear that courts will not hold directors liable for governance failure, the Disney opinion highlights the need for reforms that will make directors otherwise accountable. Decisions such as this are acceptable only within a system that provides other mechanisms for protecting the interests of investors.

Professor Rezaee, in his book *Corporate Governance Post Sarbanes-Oxley: Regulations, Requirements, and*

Director Summary: A consultant for the defense in the well-known “Disney case,” litigated in the Delaware Court of Chancery and the Delaware Supreme Court, shares his perspective on why the courts' decisions were the right ones. Both courts found that the termination package awarded by Disney's board to ousted CEO Michael Ovitz was within the bounds of the business judgement rule.

Business investment decisions involve risk, whether the decisions involve mergers or acquisitions, systems development, sports and entertainment undertakings, or the hiring or termination of senior executives.

Integrated Processes (John Wiley & Sons, 2007), follows Bebchuk with his statement, "This court opinion of not holding directors liable for governance failure definitely underscores the need for reforms, such as majority shareholder voting, to enable shareholders to hold directors accountable."

The Hiring and Termination of Michael Ovitz

Chancellor William B. Chandler's opinion, other trial-related information, and public documents point out the serious flaws in the Milberg Weiss allegations. These documents address the well-understood risks associated with business investment decisions, including the hiring of senior executives; the factors at work which may have influenced Disney's decision to seek the services of Michael Ovitz; the hiring process; the terms of the hiring; the performance of Ovitz; the termination process; and the terms of the termination.

Business investment decisions involve risk. Mergers or acquisitions, systems development, sports and entertainment undertakings, or the hiring or termination of senior executives all involve some degree of risk. Over the years, publicly available data has made clear the risks associated with these business investment decisions. Firms seek the services of capable CEOs, COOs, and other executives who often possess special talents. Large front-end, sign-on bonuses, stock and stock options, periodic bonuses, lucrative back-end payments, and other provisions are often components of the contracts entered into with these individuals. Both the hiring of a new executive and the promotion of a proven executive are fraught with risk.

For an example, one has only to examine the details of the hiring of Gary Wendt to lead Conseco Inc., where Wendt was paid a sign-on bonus of \$45 million and received various other forms of compensation, including a back-end annual pension when he turned 65 years old.

Conseco and Wendt separated only a few years after Wendt took over the leadership of Conseco.

In the case of terminations, even when a formal contract may not be in place, a company may elect to make a significant payment to a departing executive. The payout that Doug Ivestor, CEO of Coca Cola, received upon his severance from the company, is one example. When Coca Cola's board determined that Ivestor needed to step aside, Ivestor did not actually have an employment agreement that spoke to such an occurrence. Further, Ivestor was not seen as contributing in any significant ways to Coca Cola going forward. Despite that, the severance he received was estimated to be worth \$166 million.

The Decision to Hire Michael Ovitz

Chandler's opinion and the documents from the case speak to Disney's decision to seek the services of Michael Ovitz. The growth in the Disney share price from the time that Eisner and Frank Wells joined Disney in 1984 until the mid-1990s was outstanding. Ten thousand dollars invested in Disney stock in September 1984 was worth approximately \$160,000 by July 1994. In an April 1995 *Fortune* article, John Huey said, "Disney has consistently reported annual increases in profits and return on equity of more than 20 percent, and Wall Street has rewarded it by driving its market value up from less than \$2 billion in 1994 to more than \$28 billion today—bigger than Ford, for example."

In 1994, Disney was hit with multiple significant personnel issues. Frank Wells's death in April 1994 in a helicopter accident was followed four months later by Eisner's quadruple bypass surgery. At nearly the same time, Jeff Katzenberg, who headed Walt Disney Studios, departed. There had been three capable executives who had worked together for a considerable period of time; now there was only one, and that one was in the process of recovering from surgery.

Further complications developed at this time with Disney's agreement to acquire CapCities, which would add 60 percent to Disney's size. Disney's decision to seek the services of Michael Ovitz was sound. Ovitz was widely recognized as the most powerful player in the content area.

Further, Ovitz was "in play." Edgar Bronfman, chairman of Seagram's—which had acquired 80 percent of MCA from Matsushita—was estimated by *The Economist* to have placed an employment package of between \$250 million and \$300 million on the table to persuade Ovitz to become the entertainment group's new chairman. The MCA offer recognized both the power of Ovitz's position in running Creative Artists Agency (CAA) as well as his estimated income of \$20-25 million earned annually in that position. When Ovitz declined the MCA

offer, *The Economist* speculated that “it is only a matter of time before he (Ovitz) is offered yet another, more tempting media giant to run—without a young proprietor to second-guess him all the time. One would be Time Warner... another could be Viacom...”

The Hiring Process

The hiring process was well structured. An important element in Disney’s search was Disney’s “pay-for-performance” culture. The employment agreements of Eisner, Wells, Katzenberg, and others, all reflected a careful adherence to this culture of rewarding business success, which had been in place since Eisner and Wells arrived in the mid-1980s. There were no upfront signing bonuses, awards of stock, restricted stock, or guaranteed annual bonuses. Base salary compensation was seen as being reasonable; one stock option was awarded per multi-year employment contract and annual bonuses depended upon the achievement of defined performance criteria.

Marketplace acceptance of Disney’s pay-for-performance culture is well established. Corporate governance observer Nell Minow, in a December 23, 2001, *Fortune* article on Eisner, said that prior to 1996 she “applauded Eisner not just for reviving Disney, but for taking a modest base salary of \$750,000” in what she called a “truly credible pay plan based on escalated options.” The compensation structure was recognized as creative, forward-thinking, and beneficial to shareholders.

Initial discussions with Ovitz involved Irwin Russell, Disney’s compensation committee chair, Eisner, and later on, Raymond Watson, former Disney chairman and a member of the compensation committee. Having the chair of the compensation committee and another long-term board member head the negotiations ensured both compensation committee awareness and board awareness of the flow of these negotiations. Raymond Watson had been the chairman of Disney at the time Eisner and Wells joined.

A highly credible consultant, Graef Crystal, was quickly involved in assisting Russell and Watson. The negotiations were lengthy and contentious. Ovitz’s contract terms changed during the course of these negotiations. The evidence indicates that these changes in the compensation terms favored Disney.

The Ovitz deal was arm’s length. Ovitz’s advisors were capable and independent of Disney, while the individuals leading the negotiations for Disney were “informed buyers of talent” who had a clear understanding of the compensation parameters within which a compensation package with Ovitz had to be structured.

The Terms of Hiring

The investment community and the press both responded

In the case of terminations, even when a formal contract may not be in place a company may elect to make a significant payment to a departing executive.

in a strong, positive manner when the negotiations between Disney and Ovitz were revealed. The commentary was highly favorable, pointing out what many believed to be enormous synergies that could be achieved as a result of Ovitz joining Disney. While Eisner and Ovitz were friends, they had not been able to come to terms on any business arrangement over the many years during which both stood as powerhouses in the industry. Eisner was simply not willing to pay the prices Ovitz demanded.

Ovitz’s compensation conformed to Disney’s compensation structure. Ovitz received no front-end bonus, no stock awards, and no restricted stock awards. He received a stock-option grant basically equivalent to that held by Frank Wells, his COO predecessor. The no-fault termination provision was necessary to induce Ovitz to join Disney. Crystal stated that, without this provision, Ovitz almost certainly would have refused Disney’s offer, and the board might have had to entice him by offering a “huge and very likely more costly front-end bonus.”

Non-monetary considerations appear to have been a part of Disney’s negotiations with Ovitz. In Ovitz’s testimony at trial he said he found interesting the opportunity to participate on the “buy side” after having been on the “sell side” for many years. The terms and conditions of Ovitz’s compensation structure were logical and consistent with those of Eisner, Wells, and Katzenberg, as well as his past position as CEO of CAA and the compensation offer by Seagrams.

Ovitz was strongly motivated to succeed. His employment agreement, as detailed above, was pay-for-performance. With no signing bonus, or similar guarantees, compensation was mostly option-based, and thus the contract created an incentive for Ovitz to succeed. Further, Ovitz had no incentive to fail, even though there was the cash-termination benefit and the fact that his options would vest in the case of a no-fault termination. In leaving CAA and declining the MCA offer, Ovitz left cash flows far larger than the Disney cash-termination benefit. Also, there was no assurance the vested options would have any value. Furthermore, Ovitz already had sub-

Ovitz's compensation conformed to Disney's compensation structure. Ovitz received no front-end bonus, no stock awards, and no restricted stock awards.

stantial wealth.

In comparison with other high-profile, non-Disney executives, Ovitz's compensation could not be considered excessive. Proxy data for Michael Armstrong, CEO of AT&T; Carly Fiorina, CEO of Hewlett Packard; Gary Wendt, CEO of Conesco; Robert Nardelli, CEO of Home Depot; and Larry Johnston, CEO of Albertson's, demonstrate that Ovitz's termination payments were not excessive when compared with those referred to as "the Five Executives." Assuming all the executives were terminated within 15 months after hire and their respective share prices increased 25 percent, Michael Ovitz finished fourth in terms of total compensation received over the 15-month period.

The Performance of Ovitz

Talent-driven businesses are often characterized by high personnel turnover. In many respects, the story of Ovitz at Disney is the story of a clash of operating styles. Much has been written about Ovitz's operating style; it simply did not fit with Disney's culture. Certainly, Ovitz was highly motivated to succeed. He had the opportunity to exercise potentially significant influence at Disney and personal failure was not, in his view, an option. Once the organizational problems at Disney were set out for Ovitz, he only doubled his resolve to be successful in his role, but the culture clash was too great.

The Termination Process

Amongst the top leadership and the board, a broad-based awareness developed that Ovitz did not fit within the Disney operating structure. Yet, Ovitz appears to have been largely unaware of these fractures. He continued to be committed to succeeding in his role even after Eisner discussed with him the problems that were developing. His termination was apparently based on business considerations and contract driven. Disney made an effort to determine whether to effect a "for cause" termination and concluded that its only business option was to proceed along the lines set out in Ovitz's employment

contract for a no-fault termination.

Eisner headed the separation negotiations. Such an arrangement is not unusual. Given that Ovitz was on the board, it was not possible to hold any discussions regarding his performance or his pending termination at a board meeting.

The Terms of the Termination

The monetary terms of Ovitz's no-fault termination were set out in his employment contract. Ovitz was to receive, and did receive, a cash termination payment of \$38.9 million. Ovitz's 3 million shares vested, and at the time of the vesting, Disney's price had risen to \$71 a share (the strike price was \$57 a share). At the \$71 share price, Ovitz's 3 million shares had a value of \$42 million (3 million shares times \$14 per share). This total is consistent with Ovitz's statement to the press regarding his termination compensation, and contrasts with reported allegations that the termination compensation paid Ovitz was \$140 million.

Conclusion

Criticism of the Disney decision continues to this day, decrying the Delaware courts as excessively pro-business and the decision an affirmation of that culture. But those who would criticize the decision would do well to examine the evidence. The opinions of the Delaware courts point out the serious flaws in the Milberg Weiss allegations. Yet these same flawed allegations continue to be relied upon by the critics of the courts. A dose of reality is in order. ■

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